

Nos. 76-203 and 76-346

Supreme Court, U. S.
FILED

NOV 4 1976

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In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIE D. KING, PETITIONER

v.

UNITED STATES OF AMERICA

FRED LEE JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.)¹ is reported at 532 F. 2d 505.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1976, and a petition for rehearing was denied on

¹Unless otherwise noted, "Pet." refers to the petition in No. 76-346.

July 12, 1976. The petition for a writ of certiorari in No. 76-203 was filed on August 11, 1976. On August 13, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari in No. 76-346 to and including September 10, 1976, and the petition was filed on September 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner King's conspiracy conviction.
2. Whether the district court improperly commented on the evidence.
3. Whether the court of appeals erred in dismissing as moot petitioner Jones' claim that certain firearms were illegally seized, in view of the district court's refusal to admit the evidence at trial.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners and co-defendant Tellis Jones were convicted on one count of conspiracy to engage in the business of dealing in firearms without being licensed, in violation of 18 U.S.C. 371. Petitioner Fred Lee Jones and co-defendant Tellis Jones were also convicted on one count of engaging in the business of dealing in firearms without being licensed, in violation of 18 U.S.C. 922(a)(1) and 18 U.S.C. 2.² Petitioner King was sentenced to imprisonment for a year and a day. Petitioner Jones was sentenced to three years' imprisonment on each count, with the sentences to run consecutively. The court of appeals affirmed (Pet. App.).

²Petitioner King was acquitted on the substantive charge.

The evidence at trial is recounted in detail in the opinion of the court of appeals (Pet. App. 17-20). Briefly, it showed that between 1969 and 1974 co-defendant Tellis Jones purchased more than 90 firearms, petitioner Jones purchased more than 60 firearms, and petitioner King purchased at least eight firearms. Most of these weapons had been bought from Hatcher's, a sporting goods store in Donalsonville, Georgia. In February 1974, undercover Agent Joseph Forbes of the Bureau of Alcohol, Tobacco and Firearms bought two automatic pistols from Tellis Jones and told Jones that he would contact him in about a month for more weapons. On March 22, 1974, Agent Forbes again met with Jones and gave him \$215 for the purpose of purchasing three guns. Jones went to his truck, removed a .357 caliber magnum revolver, handed it to the agent, and then walked to another truck, in which petitioner Jones was sitting, and returned with another revolver. Tellis Jones told Agent Forbes that petitioner Jones would pick up the third weapon later in the day and that the agent should wait at that location for his return (Pet. App. 18-19).

About three hours later, after petitioner Jones had not returned, Agent Forbes approached petitioner King and asked if he had seen Tellis Jones. Petitioner King told the agent that Tellis Jones had left, but that petitioner Jones had gotten the pistol and was looking for him. Petitioner King also stated that petitioner Jones was a police officer and was probably at the local police station. When Agent Forbes stated that he was reluctant to go to the police station, petitioner King agreed to accompany him there. The two then drove to the police station, where they spotted petitioner Jones sitting in a police car. Petitioner King went over to the car, spoke with petitioner Jones for a short while, and then walked to petitioner Jones' nearby truck and removed a brown paper bag. When petitioner King returned to Agent Forbes' vehicle, he handed

him the bag, which contained a .22 caliber revolver. Hatcher's business records for the revolver indicated that it had been sold to petitioner King on the same day that it was resold to the agent (Pet. App. 19). In addition, substantial evidence directly implicated petitioner Jones in other firearms sales in March 1974 and January 1975 (Pet. App. 19-20).

ARGUMENT

1. Petitioner King contends (Pet. No. 76-203, pp. 11-14) that the evidence was insufficient to sustain his conviction on the conspiracy charge. The court of appeals correctly concluded, however, that the evidence outlined above, viewed in the light most favorable to the government (*Glasser v. United States*, 315 U.S. 60, 80), was adequate to support the jury's verdict (Pet. App. 20). The proof clearly showed that petitioner King knew that petitioner Jones had obtained a gun for Agent Forbes and that petitioner Jones was looking for the agent. Petitioner King also helped Agent Forbes locate petitioner Jones and, when petitioner Jones was found at the police station, it was petitioner King who removed the gun from Jones' truck and handed it to the agent. Furthermore, the owner of the shop from which the firearm had been purchased testified that he had sold it to petitioner King (Tr. 74-75). Although, as petitioner notes (Pet. No. 76-203, pp. 9-10), a handwriting expert at trial expressed the view that the signature on the firearms transaction record was not that of petitioner King (Tr. 382-383), resolution of this conflict was a matter for the jury.³

³In view of the facts of the present case, the decision below does not conflict with *United States v. Falcone*, 311 U.S. 205, where the Court found that the evidence at trial did not support the inference that the defendant knew of the conspiracy charged. Similarly, there is no conflict with the courts of appeals' decisions cited by petitioner

2. Petitioners claim (Pet. 12-15; Pet. No. 76-203, pp. 14-16) that the trial judge improperly commented on the evidence. The substance and context of the allegedly improper comment are explained by the court of appeals (Pet. App. 20-21 and n. 3), upon whose opinion we rely. As the court observed, the trial judge was alluding not to petitioners' complicity in the conspiracy but to a witness' previous testimony, and he acted within his province by suggesting that a question be clarified and that counsel frame more specific questions. In any event, as the court noted (Pet. App. 21), any possible prejudice to petitioners was cured by the trial court's explicit instruction that the jury was the sole judge of the witnesses' credibility, that the court was expressing no opinion in referring to any evidence, and that the facts were solely for the jury's determination. See *United States v. Jacquillon*, 469 F. 2d 380, 387 (C.A. 5), certiorari denied, 410 U.S. 938.

3. Petitioner Jones claims (Pet. 9-12) that the court of appeals erred in holding that his illegal search and seizure claim was moot. Although the weapons in dispute were excluded at trial because a witness could not adequately identify them, petitioner contends that he was nonetheless prejudiced by their display before the jury and their identification by the witness.

At trial, Willie Wright testified that on January 31, 1975, petitioner Jones had shown him several firearms, which Jones had offered to sell to him. Government counsel then exhibited several firearms and asked Wright if

(Pet. No. 76-203, p. 12), which found that the evidence was insufficient either to show that a conspiracy existed or to support a finding that a particular defendant had knowledge of the conspiracy or knowingly committed an act in furtherance thereof. Furthermore, the court in *Van Huss v. United States*, 197 F. 2d 120, 122 (C.A. 10), found that the evidence was sufficient to support the jury's verdict and affirmed the conviction.

he could identify them as the same weapons petitioner had offered to sell. Wright said that they were the same. After cross-examination concerning Wright's ability to identify the firearms, however, the court sustained petitioner's objection to the admission of the evidence and instructed the jury accordingly. The court also instructed the jurors that Wright's testimony concerning the incident on January 31 could be considered by them (Tr. 216-217).

In view of the trial court's exclusion of the firearms from evidence, albeit on grounds different from those urged by petitioner, and the court's instructions to the jury regarding its ruling, the court of appeals correctly concluded that petitioner was not prejudiced by these events. The damaging evidence against petitioner was the testimony of Wright, the admissibility of which petitioner does not challenge. The jury's brief observance of certain firearms which Wright could not sufficiently identify did nothing to bolster Wright's credibility or otherwise to implicate petitioner further in the crime charged.

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

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NOVEMBER 1976.